PETITION FOR WRIT OF CERTIORARI

(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS R. SPAHR & WINONA BENDON
PETITIONERS

VS.

RESORTS CASINO HOTEL, INC.
RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI

TO

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

1. Should the Plaintiffs, as Atlantic City Casino Employees diagnosed with tinnitus, a recognized disability, be afforded full and equal protection of the New Jersey Laws Against Discrimination?

2. Should the Plaintiffs, as Atlantic City Casino Employees diagnosed with tinnitus, a recognized disability, be afforded equal protection under the law as guaranteed by the XIVth Amendment of the U.S. Constitution?

3. Should New Jersey Courts render decisions (or deny certification) based upon the monetary and political influence of a Respondent?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at APPENDIX A to the petition and is unpublished.

The opinion of the New Jersey Superior Court Law Division appears at APPENDIX B to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided our case was Sept. 5, 2002.

A copy of that decision appears at Appendix C.

No petition for rehearing was filed due to Extraordinary Circumstances (Appendix D)

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, U.S. Constitution

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Jersey Laws Against Discrimination (LAD), N.J.S.A. 10:5-1 et seq.

This act shall be known as "Law Against Discrimination."

> "All of the provisions of the act to which this act is a supplement shall be construed to prohibit any unlawful discrimination against any person because such person is or has been at any time handicapped or any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment."

STATEMENT OF THE CASE

The plaintiffs, Winona Bendon and Thomas Spahr, filed separate complaints on May 7, 1999 in the Law Division alleging that the defendant violated the New Jersey law (N.J.S.A. 10:5-5 et. seq.) prohibiting job discrimination against handicapped persons. Both plaintiffs suffer from a condition known as tinnitus (ringing in the ears).

The facts and issues in both cases were similar and they were consolidated for purposes of discovery in the trial court. The defendant filed motions for summary judgment asserting that tinnitus was not a handicap under LAD and further argued that even assuming arguendo that it was, plaintiffs failed to present sufficient medical evidence that they suffered from the condition.

On March 1, 2001, the Honorable Charles R. Previti, J.S.C. granted the defendant's motion for summary judgment in both cases ruling that the plaintiffs did not present sufficient evidence to support a finding that their

tinnitus was a handicap within the definition of LAD. The Court based its decision upon its finding that the plaintiffs' only expert witness, Dr. Stephen Nagler, rendered a "net opinion". The defendant had also moved for summary judgment on the alternative ground that they made a reasonable accommodation. Plaintiffs made a cross motion on the issue of accommodation. The Court denied both motions without prejudice on the issue of accommodation. Both plaintiffs filed an appeal with the Superior Court Appellate Division, which affirmed the trial courts decision. The N.J. Supreme Court denied certification.

Resorts International Hotel and Casino, the respondent herein, hired Winona Bendon as a slot attendant on August 14, 1995. Thomas Spahr was hired as a slot attendant on August 9, 1993. Slot attendants work on the casino floor and are primarily responsible for tending to the slot machines, i.e. filling empty machines, fixing minor malfunctions, and assisting customers (paying off jackpots and answering questions). Slot attendants carried a hand

held radio for communication with each other and with supervisory personnel.

On or about November 5, 1997, Resorts modified their slot attendant uniform requirement by making it mandatory that each slot attendant be required to wear an earpiece connected to their hand radios. Prior to November 1997 slot attendants carried and communicated through handheld radios, but without the earpiece connection. The earpiece was at the end of a wire connected to the radio and would be place directly in the attendant's ear. Prior to the radio earpiece requirement, Thomas Spahr had suffered from tinnitus since approximately 1970 and Winona Bendon had been diagnosed with tinnitus since 1993. Upon wearing the earpiece Thomas Spahr immediately advised his managers of his tinnitus and was given two options. The first option was for him to take a thirty (30) day unpaid leave of absence and attempt to seek another position at Resorts with no guarantee of any new position. If he was not rehired within 30 days he would be terminated. The second

option was to wear a different earpiece that provided more comfort but did not eliminate the direct emission of noise into his ear.

Bendon, who had experience high pitched squeals from her radio when it was worn on her belt, refused to wear the earpiece in accordance with her physician's recommendation and her own common sense and was terminated on December 5, 1997 for "excessive absenteeism" for failing to appear at work Prior to her being terminated, Bendon, at the request of the respondent, sought the advice of her physicians. By letter dated November 11, 1997, her family physician, Dr. Gary W. Raab, D.O. wrote a letter in which he described Ms. Bendon as having a "history of chronic tinnitus," a "high frequency hearing loss" and recommended "that she return to the traditional method without using the earpiece, since it is clearly aggravating her tinnitus causing echoing and difficulty with her hearing". Respondents in house doctor then saw her, yet never physically examined her. J. Patrick

Clancy, Jr., M.D., who opined in a letter dated November 20, 1997 that "there is no medical reason for Ms. Bendon to be excluded from having to wear an earpiece at work." Bendon then went to a specialist, Lonny D. Matlick, D.O., who wrote on November 25, 1997 "it is my recommendation as a board certified otolaryngologist the patient avoid the use of headphones especially in situations with high frequency noise such as her work place environment". In lieu of being fired, Bendon was given the option of taking a 30 day leave without pay to look for another job or taking a position that would require her to carry bags of coins all day which she was not physically strong enough to do. She was 62 years old at the time.

Nevertheless, the respondent terminated the plaintiff for the reasons set forth in their file memorandum and personnel action form. There is no dispute between the parties about the fact that Bendon was terminated because of her refusal to wear the newly required radio earpiece.

The Defendant did not allege that wearing the earpiece was an essential job function.

By the second day that Spahr had worn the radio earpiece, he started to experience increased pain and ringing in his ears. He immediately informed one of his supervisors. Like Bendon, he also was asked to see Resort's in-house physician. Dr. Clancy never physically examined Mr. Spahr yet reported that, despite his tinnitus, there was no medical reason for his not wearing the earpiece. Spahr then consulted David G. Ansel, M.D., who reported that "The above patient . . . should not be required to wear head phones at work." He also consulted Alan B. Gertner, M.A., of the Ocean Balance and Hearing Center, who concluded that, "It is recommended that patient be cautious around noise hazardous areas, wearing ear protection or avoiding noise hazardous areas. In addition, patient should have regular (at least annual) hearing follow-up." He also consulted with Steven Berman, M.A., Ph.D. of Southern Ocean County Hospital Speech and Hearing

Center. Dr. Berman confirmed that Spahr's experience of hearing ringing in his ears matches to 8,000 Hz. And concluded that Spahr "has a mild to moderate bilateral high frequency sensorineural hearing loss. It is recommended that in order to help make sure this does not increase and that the tinnitus does not get worse, it is recommended that he be careful noise areas and he should be wearing ear protection whenever possible."

Spahr continues to work and wear the earpiece while suffering the increased symptoms of tinnitus.

In an effort to prove tinnitus should be considered a handicap under LAD, the plaintiffs retained Stephen M. Nagler, M.D. FACS, who is perhaps the most recognized expert on tinnitus in this country. Dr. Nagler is the only physician in the country who limits his practice exclusively to the identification and treatment of tinnitus.

Dr. Nagler reviewed the plaintiffs deposition transcripts and relevant medical records and issued a joint written report dated August 14, 2000 in which he concluded that

both Bendon and Spahr suffer from intrusive tinnitus and that "patients with severe intrusive tinnitus such as that described by Ms. Bendon and Mr. Spahr, are well advised to avoid the type of earphones described in the depositions, as this instrumentation will undoubtedly complicate an already extremely burdensome medical condition." Dr. Nagler also gave a de bene esse deposition and discovery deposition from his office in Atlanta, Georgia.

In finding that tinnitus is acknowledged to be a "recognized medical condition" or a symptom of a recognized medical condition, the trial court established tinnitus as a handicap under LAD, but concluded that the plaintiffs' evidence did not support a finding that their individual tinnitus constituted a handicap within the law.

ISSUES OF FAIR AND EQUAL TREATMENT UNDER THE LAW

The issue in this case is whether or not the Plaintiffs received fair and equal treatment as guaranteed by the XIVth Amendment to the U.S. Constitution. In past cases, the New Jersey Courts have accepted the exact same

types of proofs to support a claim of disability, as those offered by the Plaintiffs (Tynan v. Visinage Thirteen of Superior Court of New Jersey, et als, Enriquez v. West Jersey Health Systems, and Appendix E cases). Our attorney in the Trial and Appellate Court cited over forty cases, (Appendix E) supporting that Plaintiffs evidence was sufficient proof that they suffered from a disability know as tinnitus. These cases also showed that Dr. Naglers expert opinion should not have been classified as a "net opinion" and rejected by the Court. The New Jersey Appellate Court assumed "without deciding, that tinnitus constitutes a handicap pursuant to the LAD (Laws Against Discrimination). See N.J.S.A. 10:5-5q. We conclude however, that the motion judge, UNDER THE CIRCUMSTANCES HERE, (caps added) found correctly that plaintiffs' expert's opinion was a net opinion and, therefore, properly granted summary judgment to defendant. We, therefore, affirm."

The Plaintiffs assert that the statement "under the circumstances here" pertains to matters specifically associated with casino employees, and therefore to be given special consideration by the N.J. Judiciary, resulting in a summary judgment. This violates the "equal" treatment clause of the U.S. Constitution and is contrary to the intent of the N.J. LAD Legislation which states: "Legislature intends to focus scrutiny not on whether a particular employee's limitations qualify for protection, but on the work-site actions taken in light of whatever physical or mental limitations the worker presents". (Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501, 527 App. Div.) The Courts decision is also in opposition to legal precedent that "any degree of....hearing impediment or neurological condition" is protected, Clowes v. Termnex. The New Jersey Courts failed to focus on work-site actions of the employer because this case involves a Casino, and the Courts, through the summary judgment process know how easy it is to ignore and abrogate specific New Jersey State

Statues, which may offend the Casinos, such as the N.J. LAD. This was done for monetary reasons.

. The N.J. Judiciary decided to make an exemption for the Casinos with regards to the New Jersey Laws Against Discrimination (NJLAD). This was not accomplished thru legislative enactment, but rather thru an "off the books" understanding between the Casinos and the Judiciary, whereby Judges would set up "access barriers" for casino employees attempting to exercise their rights under N.J. LAD. These barriers for casino employees consist of requirements different from those in other occupations, and are not based upon a reasonable and fair analysis of the facts, but rather a prejudice stemming from the political and monetary influences of the Casinos. One such access barrier in this case was the "causal connection" requirement between the earpiece and the tinnitus suffered by the Plaintiffs. The other was the use of the "net opinion rule" which eliminated the Plaintiffs expert testimony. These prohibitive criteria were unnecessarily utilized by the Court

to facilitate Casino non-compliance with the New Jersey Laws Against Discrimination. These two conditions formed the basis for the Courts prospective summary judgment ruling, which effectively "accommodated" the Casino.

"CAUSAL CONNECTION" DECISION NOT BASED ON FACTS

The Appellate Court Decision states:

> "In Spahr's case, Dr. Bermans and Gertner's reports both indicate sensorineural hearing loss and complaints of tinnitus, but do not explain any causal connection between specific use of the earpiece and any aggravation of his tinnitus."

This statement by the Appellate Court demonstrates the extent to which Judges will go in order to placate politicians and Casino money. There can be no better proof to establish "causal connection" than practical experience. The facts presented to the Court indicated that Mr. Spahr wore the earpiece for almost four years, which accounts for over 8,000 hours of time. Mr. Spahr testified during his deposition that the earpiece was the instrument that caused the worsening of his tinnitus, resulting in extreme ringing in his ears as well as headaches, stress, and pain. These are

conditions that did not exist prior to his wearing the earpiece. He also explained that each day after he took the earpiece off, his headaches and the extreme ringing would slowly dissipate, thereby indicating a clear link to the earpiece being the causative factor of these conditions. The "specific use of the earpiece" by Mr. Spahr and the resulting "aggravation of his tinnitus" clearly demonstrated an irrefutable "causal connection". Additionally, the reports submitted by Dr. Berman and Gertner do offer a "clinical" causal connection between the specific use of the earpiece and aggravation of Mr. Spahr's tinnitus, when they are linked to Mr. Spahr's deposition. Mr. Spahrs' deposition relates what Dr. Berman advised him of; and how the earpiece is the specific instrument that aggravates the tinnitus. Mr. Spahrs answers also identified the three critical elements, which the Court Decision addressed. Those being, "causal connection", "specific use of the earpiece" and "aggravation of his tinnitus". (Items in brackets added)

Q. Resorts attorney: "What is it about the earpiece then exactly that exasperates the tinnitus?"
A. Mr. Spahr: "When you place something in your ear, in your ear that admits noise that according to one of the doctors who I spoke with Dr. Berman, causes the ear, the air in the ear to vibrate and causes what he said was muscle spasms in the ear, to be very specific, (specific use of the earpiece), and I'm quoting what he told me. Those muscle spasms exasperate the tinnitis and cause the ear to ring. Now, when you place something away from your ear here there is a distance that sound must travel before it comes into your ear, so it's not as powerful and not as loud. When you place it directly into your ear, it is a confined area. That area is confined. So it is the vibrations of the noise itself in the ear that causes (causal connection) the tinnitus to get much worse. (aggravation of his tinnitus)" (Spahr Deposition pg. 50, App. F)

The actual "causal connection" between the earpiece and the worsening of the Plaintiffs tinnitus can be attributed to the PROXIMITY of the earpiece to the wearers ear, and the transmission of noise directly into the ear canal, causing "MUSCLE SPASMS". These facts were told to Mr. Spahr when Dr. Berman at the Southern Ocean County Speech and Hearing Center diagnosed him. Indeed the "causal connection" was well established, and had the Courts independently and impartially evaluated ALL of the

evidence and proofs submitted by the Plaintiffs, with an open mind not contaminated by politics or money, they would have concurred. The Court recognized that it had to ignore the evidence submitted by the Plaintiffs in order to justify its findings and protect the Casino establishment. Instead the Court focused on Dr. Nagler's report stating, "the only, apparently, testimony he (Dr. Nagler) had with respect to Spahr was that it would interfere with his concentration abilities." The Courts decision is replete with purposeful omissions and distortions.

"CAUSAL CONNECTION" DECISION A PRETEXT AND ARTIFICIAL BARRIER

The Appellate Court stated:

> "Because both plaintiffs suffered from tinnitus prior to being required to wear the earpiece, they had to submit medical evidence that the use of the earpiece aggravated their tinnitus. Further, we are satisfied that because the proofs show that noise can aggravate tinnitus, and both plaintiffs worked on the casino floor where there's a lot of noise, they had to submit expert proofs that the source of the aggravation of their tinnitus was causally related to the earpiece as opposed to the noise in their work environment on the casino floor. Both plaintiffs failed to submit the requisite proofs."

This condition imposed upon the Plaintiffs by the Courts represents an artificial barrier and a pretext used to justify the Court's decision to grant summary judgment. The issue in this case was never casino noise, it was earpiece noise. In order to protect the Casinos the Court mixed the two, and found that they could diminish or totally eliminate the effects of the earpiece on the defendants tinnitus by claiming that the casino noise was in some way responsible for the damages done to the Plaintiffs. What's worse is that they denied the Plaintiffs access to the NJLAD. By requiring the Plaintiffs to separate out the two noise sources, the Courts could defend the Casinos by demonstrating there was insufficient evidence to prove a "causal connection". This shows how Judges, including **PREVITI, BRAITHWAITE AND WEISSBARD** will impose conditions upon Plaintiffs, with full knowledge that those conditions have no relevance to the issue at hand, but will eventually be utilized by the Court to favor a party who has money and political influence. By the same

pretext, it required an "expert" to differentiate casino noise from earpiece noise, thus eliminating the evidence submitted by six specialists, which Plaintiffs retained to diagnose their condition and the effects of the earpiece. All of who recommended to Resorts that the Plaintiffs not be required to wear the earpiece due to its effects on tinnitus. No "expert" was required considering the prima facie evidence. Still, Dr. Nagler stated "the type of noise levels that would be required in order to hear verbal messages through an ear piece while a person is in a crowded room would certainly be of a degree loud enough to exacerbate tinnitus." The Courts intent at the outset of this case was to issue a ruling in favor of the Casino, due to it's money and political influence; and irrespective of what our expert, (Dr. Nagler) would have concluded, his findings would have been classified as a net opinion in order to justify the summary judgment. Jury members certainly would have been able to wear the earpiece in a casino and know its deleterious effects if the Court had allowed full access.

COURT DECISION ON NET OPINION IN ERROR

Because the Plaintiffs are casino employees, the Court established arbitrary and capricious standards, requiring them to hire an expert in order to compare the environmental noise conditions in the Casino with the noise being emitted from the earpiece. Purportedly, this would establish a "causal connection" between wearing the earpiece and the aggravation of the Plaintiffs tinnitus. As already demonstrated, casino noise had no influence on the Plaintiffs tinnitus, due to its distance from the physical ear, thereby negating any necessity for measurement or comparisons by an expert. Additionally, the noise emitted from the earpiece was always greater then the ambient noise of the casino, due to its positioning in the ear, and the requirement by Resorts that all transmissions must be heard and responded to by slot attendants, or disciplinary action would ensue. In order to do this slot attendants had to have the volume control on their radios on high, thus emitting an extremely loud noise level from the earpiece in order to

overcome background noise. It is precisely for this reason that the Plaintiffs Doctors as well as Dr. Nagler advised Resorts that the Plaintiffs should not wear the earpiece. The Court asserted that Dr. Nagler's opinion fell "far short of that which is required to satisfy plaintiffs' burden in a case of this kind....even drawing all reasonable inferences in favor of plaintiffs and against defendant, plaintiffs still have not made the necessary prima facie showing." The plaintiffs disagree with this conclusion, noting that the "burden" established by the Court was in the interest of the casino money and had no direct bearing on the merits of our case. The fact that Dr. Naglers' opinion was rejected as a "net opinion" clearly demonstrates that no "reasonable inferences" were given to the plaintiffs, and that Resorts was the party given the "accommodation". The N.J. Laws Against Discrimination requires a "liberal interpretation" of worker disability, and a focus on work cites actions by employers to accommodate employees. The Courts scrutiny instead was on whether or not the Plaintiffs had a

disability, and ways in which the Court could extemporaneously disprove the existence of that disability by requiring an analysis of irrelevant factors. Indeed the decision by Judge **PREVITI**, which was affirmed by the Appellate Court, that the evidence does "not support a finding that (plaintiffs') tinnitus is a handicap" under the LAD, is in direct opposition to a decision rendered in Viscik v. Fowler Equipment Co., Inc. N.J. Sup Ct. where it states that a Judge in charging a JURY should utilize an objective standard regarding the establishment of a handicap and the ability of a person to perform a job. That charge reads: "In addition to showing by a preponderance of the evidence that she is handicapped the plaintiff is required to establish to your satisfaction...". This charge clearly demonstrates that it is the JURYS responsibility to determine who is or is not handicapped based upon their evaluation of the evidence presented in Court, and not the Judges. Judge **PREVITI** usurped the authority of the Jury in this matter, and the Appellate Court affirmed his error.

The Plaintiffs also cite Tynan v. Vicinage 13 of the Superior Court of New Jersey, wherein the Court regarding a trial courts ruling on a "net opinion" states that "the sins or faults of an errant attorney should not be visited upon his client." The fact that Dr. Nagler, did not visit the Casino, take sound measurements, examine the earpiece or the Plaintiffs, were all decisions made by the Plaintiffs Attorney. The Court should not have discounted all medical evidence, or denied the Plaintiffs redress based upon a decision made by counsel as was done in this case. Instead, the totality of evidence should have been considered. The Appellate Court allowed the "net opinion" decision to stand, thereby visiting upon the Plaintiffs, the "sins or faults of an errant attorney", which is clearly prohibited by precedent as well as due process.

N. J. COURTS A MODEL OF CORRUPTION

Most New Jersey citizens recognize that the New Jersey Court system is historically corrupt and its Judges can be easily bought, either by money or political influence.

Examples of this corruption can be found in Judge **BRAITHWAITE** of Atlantic County, N.J. who is known to be in the hip pocket of New Jersey politicians, and has been suspected of accepting bribes in return for his decisions. Judge **BRIATHWAITE** has also shown contempt for constitutional due process in his decisions. At the New Jersey Supreme Court, Chief Justice **PORITZ** has condoned and encouraged prosecutorial misconduct as well as racial profiling for many years. New Jersey Supreme Court Justice **VERNIERO** also has condoned and encouraged racial profiling, and lied to a N.J. Senate Investigation Committee regarding his conduct in that regard. New Jersey Senate Resolution No. 2 demanded that he resign from the N.J. Supreme Court because of his support of racial profiling by the N.J. State Police. Acting Governor Donald T. DiFranscesco also requested that Justice **VERNIERO** resign. Yet, he refused to resign, and he as well as Justice **PORITZ** denied certification on our case in the N.J. Supreme Court. Each of these Justices

should have recused themselves from any matter presented to the N.J. Supreme Court regarding discrimination, such as those contained within, due to their discriminatory and unconstitutional proclivities.

. The point here is that Justice is for sale in New Jersey, and the highest bidder at this time is the casino industry, which pumps hundreds of millions into the tax coffers. This money is distributed throughout the state, and the politicians (who appoint the Judges) get credit for the improvements that this money creates in their Districts. Consequently, pandering Judges in New Jersey skew their decision in favor of the Casino interests due to this money factor. Both N.J. Politicians and Judges alike are well served in shielding Casinos from any legal responsibility to their handicapped workers. (Schurr v. Resorts)

REASONS FOR GRANTING THE WRIT

Casino gaming is one of the fastest growing industries in the United States today. The reason for this is the billions of dollars that casinos pump into the economy and tax coffers. Politicians in N.J., and the Judges they appoint are eager to curry favor with casino executives in return for this money. One of the easiest and most expedient ways of showing their gratitude to the Casinos is to afford them a business environment free of any legal impediments, which is what Casinos consider employee disability matters. New Jersey Judges are notorious for basing their decisions upon money and political influence, which is unconstitutional.

DUE PROCESS AND EQUAL PROTECTION

The Plaintiffs were denied due process and equal protection of the law. The evidence provided was more than sufficient to show that both Plaintiffs were handicapped, and that they should have been afforded a

reasonable accommodation. The Appellate Courts affirming of the respondent's summary judgment on the grounds that there was no "factual basis to distinguish between the sound or noise generated by the earpiece and the noise generated by the activities on the casino floor" is reason enough to conclude that the Court was influenced by Casino money and rendered a flawed decision which prohibits due process and equal access.

Casinos must acknowledge that they have a responsibility to their handicapped employees, and the Courts in New Jersey must recognize the same thing. The U.S. Supreme Court should hear this Case in order to establish due process and equal protection of the law. In so doing, employees who work in a Casino (or any industry which exerts inordinate amounts of political as well as monetary influence) can rest assured their rights are being protected, and they have equal access to the Laws which were enacted for their benefit. The standard for determining a disability, and the causative factors are

historically the domain of the Jury, not a prejudiced Judge. The Plaintiffs herein have been subjected to an unfair and unequal application of the Law for all too obvious reasons, money and politics. The Plaintiffs have been denied access to the NJLAD by Judges who have utilized unfounded pretexts couched in the legal jargon of "causal connection" and "net opinion".

In recent years Legislatures throughout the country have seen fit to remove physical barriers to buildings, which prohibited handicapped access. The Courts in New Jersey, with their antediluvian prejudices, along with monetary and political bias, have set up legal barriers, which are just as much an impediment to accessing justice for the disabled as were the dozen steps leading to the Courthouse. The U.S. Supreme Court needs to remove these barriers so justice is accessible to the handicapped, and they are afforded the full and equal protection of the legal process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas R. Spahr Winona Bendon

Date: March 24, 2003

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE APPEALLATE DIVISION

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION
A-4187-00T2
FILING DATE: APR. 24, 2002

WINONA BENDON,
Plaintiff-Appellant,

v.

RESORTS INTERNATIONAL HOTEL, INC.
Defendant-Respondent.

THOMAS R. SPAHR
Plaintiff-Appellant

v.

RESORTS INTERNATIONAL HOTEL, INC.
Defendant-Respondent.

Submitted March 25, 2002 – Decided April 24, 2002

Before Judges Braithwaite and Weissbard.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket Nos. L-1578-99 and L-1579-99.

Louis P. McFadden, Jr. attorney for appellants.

Mc.Elroy, Deutsch & Mulvaney, attorneys for respondent (John T. Coyne, on the brief).

APPENDIX A

PER CURIAM

We have combined these appeals in one opinion because the issued raised are identical and involve a common defendant, Resorts International Hotel, Inc., a casino hotel. At all relevant times, plaintiffs Winona Bendon and Thomas Spahr were employed by defendant as slot attendants, a position that required both plaintiffs to communicate with other employees while performing their duties on the casino floor.

Plaintiffs appeal from the grant of summary judgment dismissing their complaints seeking damages and other relief under the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to –49. Both plaintiffs contend that at the time they were hired by defendant, they "suffered from a handicap diagnosed as a chronic tinnitus." Tinnitus is defnied as "[n] oises (ringing, whistling, hissing, roaring, booming, etc.) in the ears." PDR Medical Dictionary, 1838 (2nd Ed. 2000).

The motion judge found, following a hearing on defendant's motions for summary judgment, that: (1) "tinnitus is acknowledged to be a recognized medical condition or a symptom of a recognized medical condition; (2) the evidence does "not support a finding that [plaintiffs'] tinnitus is a handicap" under the LAD; and (3) the opinion expressed by plaintiffs' expert lacked factual support and is a "net opinion." The judge, therefore, granted defendant's summary judgment motions.

Both plaintiffs assert on appeal that the motion judge erred in finding that plaintiffs' expert's opinion was a net opinion and that the judge erred in finding that plaintiffs submitted insufficient proof that their tinnitus constituted a handicap under the LAD.

For purposes of this appeal, we assume, without deciding, that tinnitus constitutes a handicap pursuant to the LAD. See N.J.S.A. 10:5-5q. We conclude, however, that the motion judge, under the circumstances here, found correctly that the plaintiffs' expert's opinion was a net opinion and, therefore,

properly granted summary judgment to defendant. We, therefore, affirm.

On appeal, the standard of review of a grant of summary judgment is whether the evidence, together with all legitimate inferences that could be drawn therefrom, could sustain a judgment in favor of the party opposing the motion. R. 4:37-2(b); Dolson v. Anastasia, 55 N.J. 2, 5 (1969). If reasonable minds could differ, the motion must be denied. Ibid. We must view "the facts that may be inferred from the pleadings and discovery in the light most favorable to the plaintiffs." Strawn v. Canuso, 140 N.J. 43, 48 (1995).

These are the relevant facts as to both plaintiffs. Defendant hired Bendon as a slot attendant on August 14, 1995. At the same time according to Bendon, she suffered with tinnitus. Spahr was hired as a slot attendant in August 1993. Spahr also suffered with tinnitus at the time he was hired. Slot attendant work on the casino floor and are primarily responsible for tending to the slot machines by filling empty machines, fixing minor malfunctions, and

assisting customers. "There [is] a lot of noise on the casino floor." As to the cause or aggravation of tinnitus, "most...is noise induced." When plaintiffs were hired, slot attendants wore hand-held radios on their belts in order to communicate with one another and with their operation base.

On or about November 5, 1997 defendant implemented the use of an earpiece attachment to the radios used by the slot attendants. The earpiece has a foam piece, one inch in diameter, which goes against the ear and a rubber or plastic piece which goes behind the ear. As noted, prior to November 5, 1997, attendants communicated using the hand-held radios, but without the earpiece.

On or about October 8, 1997, one month before defendant issued an earpiece to any slot attendants, Bendon wrote a memo to the slot department management outlining her concern over the use of radio earpieces. Particularly, she was concerned over an increased risk for cancers associated with electromagnetic waves and the fact that the earpiece would be a direct link to the brain for such waves.

When defendant formally issued the earpiece to Bendon, she refused to wear it. It was at this time that she first told defendant that she had tinnitus. She claimed that she did not want to "increase her hearing loss". She has never tried to wear the earpiece even for one shift, claiming that it is just "common sense" to know that it would affect her condition.

On November 7, 1997, Bendon was given a written notice of unsatisfactory performance by Joanne Kraly, the slot department manager, for refusing to wear the earpiece. Bendon was informed that her failure to wear the earpiece may result in future disciplinary action up to and including termination. She subsequently called out sick on November 8 and 9, 1997, reporting that she had a stomachache. November 10 and 11 were scheduled days off.

In an unsigned letter dated November 11, 1997, Gary W. Rabb, D.O., Bendon's family physician, wrote that she was previously evaluated for complaints of tinnitus and "was felt to have some high frequency hearing loss." It was his recommendation that she not be required to use the earpiece.

Bendon returned to work from November 12 through November 16, 1997. On November 12, 197, Bendon again met with Ms. Kraly over her failure to follow department guidelines when calling out sick. On November 9, 1997, Bendon did not call at least two hours prior to her starting time, as required.

Defendant asked Bendon to submit to an evaluation by its doctor. On November 18, 1997, Bendon was seen by J. Patrick Clancy, Jr., M.D. In a letter dated November 20, 1997, Dr. Clancy wrote that "[t]innitus specifically would not be made worse by wearing an earpiece to a radio." He opined that there was no medical reason for Bendon not to wear the work-issued earpiece.

Bendon was absent from work again from November 19, 1997 through November 23, 1997, due to the "earpiece conflict." As noted, Bendon never tried to wear the earpiece at any time. On November 25, 1997, Bendon met with management over he excessive absenteeism. Bendon was again warned that in order to do the job of slot attendant, she

had to wear the earpiece. She was also warned that, although it did not want to terminate her, defendant would have no choice if the attendance problem continued. Bendon was informed that she could take a leave of absence, during which time she could speak with defendant's employment representative to determine if other jobs were available. A previous call regarding employment options revealed a slot bank position was available to which she could apply. The meeting concluded with Bendon stating that she would not decide that day whether to take a leave, but would inform defendant of a decision.

Bendon subsequently turned down the slot bank position. She testified at her deposition that she refused the position because it required "carrying around bags of coins all day," which she did not believe she was physically strong enough to do.

Bendon's record shows that she was absent again from November 26 through 30, 1997, December 3, and December

5, 1997. On December 5, 1997, Bendon was terminated for excessive absenteeism.

A letter was received by defendant on December 8, 1997, from Lonny D. Matlick, D.O., an otolaryngologist visited by Bendon. In the letter dated November 25, 1997, the doctor recommended that Bendon avoid the use of headphones 'especially in situations with high frequency noise such as her work place environment." The report only makes reference to her subjective complaint of tinnitus.

Spahr was issued his earpiece on November 5, 1997, and wore it for that day's shift without incident. The second day he wore it, he called one of his supervisors to complain about "pain in [his] ears, ringing." Spahr was seen by Dr. Clancy who stated that there was no relatonship between wearing an earpiece and worsening tinnitus. Moreever, it was his opinion that there was no medical reason for Spahr to be excluded from wearing the earpiece at work.

On December 9, 1997, Spahr submitted a note to defendant from David G. Ansel, M.D. The note stated that

Spahr had "noise induced hearing loss and intolerance" and that he "should not be required to wear head phones at work."

On March 8, 1998, Spahr was seen by Alan B. Gertner, a licensed audiologist. Audiological testing revealed a bilateral, high frequency, sensorineural hearing loss that was moderate on the right and mild on the left. Gertner recommended that Spahr be cautious around or avoid "noise hazardous areas." The only reference to tinnitus was that Spahr "reports accompanying tinnitus."

Subsequently, Spahr consulted with Steven E. Berman, Ph.D, another audiologist, on August 11, 1999. The report from Berman noted that Spahr complained of tinnitus. It concluded that Spahr had a mild to moderate sensorineural hearing loss and recommended that preventative measures be taken to avoid noise areas and to wear ear protection when possible.

Spahr continues to work wearing the earpiece, but claims that his tinnitus has gotten much worse as a direct result.

Plaintiffs failed separate complaints on May 7, 1999, alleging that defendant violated the LAD. The facts and issues were sufficiently similar so the cases were consolidated for discovery purposes.

Following discovery, defendant filed motions for summary judgment asserting that tinnitus was not a handicap for LAD purposes and assuming, arguendo, that it was, plaintiffs failed to present adequate medical proof that they suffered from the condition. With respect to Bendon, defendant asserted that she also failed to disprove that her termination was for a legitimate reason – absenteeism. Plaintiffs cross-moved against defendant on the issue of reasonable accommodation.

On March 1, 2001, and March 6, 2001, the motion judge granted defendant's motion for summary judgment. The judge denied, without prejudice, defendant's motion for summary judgment on the issue that Bendon's termination was legitimate. The judge also denied defendant's motion

and plaintiffs' cross-motion without prejudice on the issue of reasonable accommodation.

Because both plaintiffs suffered from tinnitus prior to being required to wear the earpiece, they had to submit medical evidence that the use of the earpiece aggravated their tinnitus. Further, we are satisfied that because the proofs show that noise can aggravate tinnitus, and both plaintiffs worked on the casino floor where "there's a lot of noise," they had to submit expert proofs that the source of the aggravation of their tinnitus was causally related to the earpiece as opposed to the noise in their work environment on the casino floor. Both plaintiffs failed to submit the requisite proofs.

Here, the only evidence that plaintiffs suffered from tinnitus was their subjective complaints. Plaintiffs retained Stephen M. Nagler, M.D., as their expert. Dr. Nagler is a surgeon by training who spent approximately thirteen years specializing in general surgery, colorectal surgery and breast surgery. Approximately three years ago, he discontinued

this surgical practice and founded the Alliance Tinnitus Center in Atlanta, Gerogia. On November 1, 2000, Dr. Nagler's deposition was taken at his office in Atlanta, Georgia.

Dr. Nagler testified that he never spoke with, nor examined either plaintiff. Nor did he visit defendant's place of business to examine the conditions under which plaintiffs worked. Furthermore, he testified that he did not observe the actual earpiece, nor did he measure the amount of sound that is emitted by it. He also never measured the sound level in the casino area where plaintiffs work, nor determined whether the pitch from the earpiece was higher or lower than the environmental work sounds.

Dr. Nagler further testified that 97% of tinnitus cannot be clinically detected. He stated that there is not test to determine the severity of tinnitus and that he himself bases his entire diagnoses on "what the person tells me." He testified that he uses written questionnaire type tests to se how treatment is working, but that even those are just

indicators of severity because some people are "exaggerators" and others are "minimizers." The doctor also testified that there is a reliability test that can be done to confirm the impression of tinnitus, but that this test was never done on either plaintiff.

Dr. Nagler testified that hearing conditions are not worsened by tinnitus and that tinnitus itself cannot cause hearing loss. He further opined that as he understands the LAD, not every person with tinnitus is "handicapped." He stated that he would distinguish between someone who would be considered handicapped and someone who would not by "what [the] person tells me."

When asked for an opinion as the whether Bendon should wear the earpiece, Dr. Nagler testified that he did not have an opinion because Bendon had never tried the earpiece. As for Spahr, Dr. Nagler admitted that he had not rendered a diagnosis as to the cause of Spahr's tinnitus. He testified that after reviewing what Spahr said in his deposition, he

believed Spahr's statements that the noise exposure at work and the earpiece worsens the tinnitus.

It is the plaintiffs' burden in LAD claims to prove through expert evidence that they are handicapped. Clowes v. Terminix Int'l, Inc. 109 N.J. 575, 597 (1988). An expert's opinion must be based upon a factual and scientific basis. Rubanick v. Witco Chem. Corp, 242 N.J. Super. 36, 45 (App. Div. 1990), modified on other grounds, 125 N.J. 421 (1991). In other words, "[e]xpert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonable accurate conclusion as distinguished from a mere guess or conjecture." Vuocolo v. Diamond Shamrock Chem. Co., 240 N.J. Super. 289, 299 (App. Div.), certif., denied, 122 N.J. 333 (1990) (citation omitted). When an expert's opinion is merely a bare conclusion unsupported by factual evidence. i.e., a "net opinion", it is inadmissible. Buckelew v. Grossbard, 87 N.J> 512, 524, (1981). "In essence, the net opinion rule requires an expert witness to give the why and

wherefore of his expert opinion, not just a mere conclusion." Vitrano by Vitrano v. Schiffman, 305 N.J. Super, 572, 577 (App. Div. 1997). Our Supreme Court stated that the net opinion rule "frequently focuses . . . on the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Buckelew, supra. 87 N.J. at 524.

In Bendon's case, there is the letter from Dr. Raab that states that she has a history of tinnitus and that she should return to the "traditional method without [] the earpiece." Dr. Matlick reports that she has hearing loss and complains of tinnitus. Neither of these are sufficient to explain a causal connection between using the earpiece and the alleged aggravation of her tinnitus. Jimenez v. GNOC, 286 N.J. Super. 533, 540 (App. Div.), certif. Denied, 145 N.J. 374 (1996). Moreover, it would be impossible to render such an opinion in Bendon's case because she has never used the earpiece.

In Spahr's case, Dr. Berman and Gertner's reports both indicate sensorineural hearing loss and "complaints" of tinnitus, but do not explain any causal connection between specific use of the earpiece and any aggravation of his tinnitus. Ibid.

Dr. Nagler's opinion also fell far short of that which is required to satisfy plaintiffs' burden in a case of this kind. See Dawson v. Bunker Hill Plaza Assoc. 289 N.J. Super. 309, 324 (App. Div.), certif., denied, 146 N.J. 569 (1996). As noted, although the earpiece is somehow alleged to aggravate the tinnitus supposedly suffered by both plaintiffs, there is no evidence of a causal connection between wearing the earpiece and the aggravation of their tinnitus. Ibid.

Dr. Nagler's opinion was simply a net opinion, which did not provide a factual foundation to support plaintiffs' claims. Buckelew, supra, 87 N.J. at 524. Even drawing all reasonable inferences in favor of plaintiffs and against defendant, plaintiffs still have not made the necessary prima facie showing. Dr. Nagler's opinion was based upon

reviewing plaintiffs' depositions and medical reports. He admitted that he never examined nor spoke to either plaintiff; never visited the casino floor where plaintiffs work; never observed the earpiece in question; never measured the sound emitted from the earpiece; and never measured the sound or noise on the casino floor. Furthermore, he testified that his opinions are based solely upon a patient's subjective complaints regarding their symptoms.

In granting defendant's motions for summary judgment, the judge said with respect to the "net opinion" issue the following:

> It lacks factual support . . . . He [Dr. Nagler] never visited the casino to hear the noise levels that are – the noise levels of every day work are any different – which are great – whether they are any different than the noise levels, whether they are staccato blasts or not, whether they are turned up or tuned down, from what would be caused by the specific earpiece they've asked them to wear.
>
> [H]e never visited the casino, he never examined the earpiece, he never saw what kind of an earpiece and how it functioned and wht kind of noises came out of it and how you can turn it down and how it would function in the environment of the casino with all the

> other noise, whether you could still hear it or not. I can't speculate. We're here looking at the whys and wherefores, whether it's junk science or not; the whys and wherefores, the factual basis, the reasons given for the opinion and I find that they are deficient.
>
> . . . . .
>
> So with respect to both of these . . . I find that there is a lack of – a basis for a report that is a net opinion and insufficient . . . The whys and wherefores really were not appropriately established by a sound factual basis.

We agree. Without a factual basis to distinguish between the sound or noise generated by the earpiece and the noise generated by the activities on the casino floor, there is no basis to conclude that the aggravation of plaintiffs' tinnitus is caused by the earpiece as opposed to the noise in plaintiffs' work environment without the earpiece. We are satisfied that on the issue of the cause of plaintiffs' aggravation of their tinnitus, the proofs are "so one-sided that defendant must prevail as a matter of law." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 533 (1995) (citation omitted).

Finally, without filing a cross-appeal, defendant also argues in its brief two other points not addressed by

plaintiffs. Defendant contends that Bendon was legitimately terminated for absenteeism and that had no obligation to accommodate both plaintiffs. We decline to address these arguments because defendant did not cross-appeal and accordingly is bound by the motion judge's decision. Brown v. Davkee Inc., 324 N.J. Super. 145, 148 n.1 (App. Div. 1999).

Affirmed.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
ATLANTIC COUNTY
DOCKET NOS. L-1578-99/L-1579-99
A.D. #_____

BENDON & SPAHR
Plaintiffs,

VS.

RESORTS INTERNATIONAL, INC.
Et al., Defendant.

TRANSCRIPT

OF

MOTION

Place: Atlantic County Courthouse
1201 Bacharach Boulevard
Atlantic City, NJ 08401

Date: February 16, 2001

BEFORE:

HON. CHARLES R. PREVITI, J.S.C.

TRANSCRIPT ORDERED BY:
Thomas R. Spahr
109 Ladis Way
Little Egg Harbor, NJ 08087

APPEARANCES:
LOUIS P. McFADDEN, JR. ESQ. (Louis P. McFadden, Jr., P.C.) Attorney for Plaintiffs

STEPHEN C. SCHRIER, ESQ. (Obermayer, Rebmann, Maxwell & Hippel, L.L.P.) Attorney for Defendant

APPENDIX B

THE COURT:

Okay. The issues that are presented before the Court are issues of first impression in New Jersey and they're very interesting issues and I wanted counsel to argue fully -- have an opportunity to fully argue their points, which they have. And I took it seriously and spent several hours reviewing all of the briefs and the case law and the statue on this issue prior to today.

And it's a troubling issue, indeed, as far as tinnitus being a handicap. Nobody said it wasn't medically recognized, that a ringing in the ears which, apparently, is a symptom of an underlying condition, as Mr. McFadden explained, between the brain and the ear or whatever, causes this ringing in the ears, but no one has been able to specifically pinpoint it. So you have a condition, the symptom of which is a ringing in the ears, according to the – everything that I've seen on the record and heard from counsel. Is that considered a handicap in the State of New Jersey?

Whether it's considered a handicap or not – oh, and by the way, it cannot be confirmed by objective medical examination. You're forced to rely, apparently, 100 percent on the plaintiffs' testimony. If there have been instances in the plaintiffs' history that would cause, according to physicians, the onset of tinnitus – and apparently there are – then that could be some further basis for an opinion. Nothing in the record indicates that either of these two plaintiffs had a particular incident which could give rise to a tinnitus condition.

I note from Doctor Raab, who's apparently Bendon's treating – family doctor – he said he's treated her for a long time and that she's had tinnitus for a number of years, even before the onset of this complaint. Because I guess the number one issue always is does the plaintiff have tinnitus? Are they lying? Does she simply not want to wear an earphone because she's foing to get electromagnet things in her brain or not? Is that the real reason for it? She's never stuck one in her ear yet, to this day.

That's not for me to answer; that's for the Jury to decide because – or if she does have the tinnitus because this rose before she was asked to put the earpiece in her ear, is it as bad as she say it is? Because she had been able to work around all that noise in the casino with no problem. That's an issue for the Jury. That's not an issue for me. It caused me some question, but I accept everything that plaintiff says for purposes of this summary judgment motion.

And what she says is that the noises aggravate her tinnitus. That's what Doctor Raab said on November 11th, 1997. That's what Doctor Nagler said on August 14th, 2000. "Noise exposure almost universally aggravates her tinnitus." That was a general comment. "This type of noise level" - - "Patients with severe intrusive tinnitus" - - he's accepting her testimony about how bad the tinnitus is - - "find that noise exposure almost uniformly aggravates their tinnitus."

The underlying condition that they have, apparently, regardless of the earphone, according to the plaintiffs' expert, Doctor Nagler, is that, "They describe a tinnitus that

is constant, intense, interferes with the ability to communicate, affects their ability to sleep, causes headaches and causes distress." That's without the earpiece. I mean she's never put that earpiece in her ear. This is what she describes she suffers from.

He says that noise level that are below OSHA standards can easily exacerbate intrusive tinnitus, so noise levels over can aggravate them. So she says it makes her tinnitus worse which means, I guess, it increases the ringing in her ear, according to her testimony.

Now she says that the - - all the doctors talk about tinnitus so I have to believe that it is a recognized condition - - medical condition in the medical field. I can't say it's not. That's my firs finding. And I guess maybe the defendants can do an order and put that finding down. The Court finds that tinnitus, based on the record, is an acknowledged medical condition or a symptom of a medical condition, one or the other, as Mr. McFadden argues.

The question is does it meet the definition of physical disability in 10:5-5q: "Handicap means suffering from a disability caused by bodily injury" - - well there's not testimony of bodily injury - - birth defect or illness." Now we don't know - - nobody knows what causes tinnitus except perhaps injury; and episode involving injury can cause tinnitus. (Phone rings on bench, other matter discussed)

The COURT: Where was I? So we don't know whether it's congenital or if it just happens or if it's an injury - - if it's a condition that is caused by some kind of a problem with the nerve like multiple sclerosis or what. In this case, it's not caused by injury.

An then it goes on to say - - and the issue is - - well, because we don't know what causes it, if it's a recognized condition does that mean it's a handicap - - it's not a physical disability or it shouldn't be considered a handicap? Then they go to go on to say "which prevents the normal

exercise of any bodily or mental functions" - - "the normal exercise."

The other cases all talked about, "Impairment significantly restricting an ability to work or hear. That comes from the Delugos casse. "A substantial limitation" are the words from the Stevanovik case.

"Limits, substantially limits, one or more major life activities including the functions of caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." That comes from thee Court of Appeals of Ohio, 10th Appellate District, Franklin County; Ratliffe case.

Now does that mean any condition, howsoever minor, qualifies as a handicap? I don't know that that's what it means. And I guess that's why you have to look at it on a case-by-case basis. Has this tinnitus prevented the normal exercise of bodily function? Hearing. She has a - - both plaintiffs have hearing loss. There's no testimony the tinnitus caused that hearing loss or that the hearing loss

caused the tinnitus. They were able to function and do their job with their tinnitus. They were able to function in life with their tinnitus.

"The normal exercise of any bodily function." The bodily function would be hearing. Or even functioning - - if the tinnitus was so bad as to cause them physical illness and sickness, an inability to even do a job, separate and apart from just hearing of not. I think it's more than just hearing. I don't know that this tinnitus that we have seen in these two plaintiffs, on a case-by-case analysis, prevents the normal exercise of any bodily or mental function. I don't see that there's proof of that.

"Or is demonstrable medically or physiologically by accepted clinical or laboratory diagnostic techniques." There's no proof of that in this case either. And I'm just reading the statue and applying the statue to this case on a case-by-case basis.

Everyone's opinion that she has tinnitus is predicated - - not upon a history, not upon an event, but upon them saying

so; a subjective complaint. And I don't find that that comes within the definition of handicap. So I don't find that they suffer a handicap under the statue as written. I guess you better make that - - and your motion is granted on that grounds.

Secondly, and just as importantly, the second grounds to strike the complaint, that there's not been adequate medical proof of tinnitus. Doctors - - a generalist, a D.O., Raab, who says that she says she has tinnitus, she shouldn't wear it - - that's not adequate. Matlick that says she has a hearing loss, I mean that's not adequate. We have to go to Nagler - - Nagaler's report. And as pointed out by the defendant, it's a net opinion. And the Court finds it's a net opinion and that the medical proofs are insufficient. You can put that in the order. You don't have to put the reasons; that's a matter of record.

It lacks factual support as indicated in Paragraph 20, Page 6 of defendant's briefs. He never visited the casino to hear the noise levels that are - - the noise levels of every day work

are any different - - which are great - - whether they are any different than the noise levels, whether they're staccato blasts or not, whether they're turned up or tuned down, from what would be caused by the specific earpiece they've asked her to wear or by the substitute earpiece they've asked them to wear. This goes to Ms. Bendon's as an additional grounds for the granting of the motion.

She never visited the casino, never examined - - he never visited the casino, he never examined the earpiece, he never saw what king of an earpiece and how it functioned and what king of noises came out of it and how you can turn it down and how it would function in the environment of the casino with all the other noise, whether you could still hear it or not. I can't speculate. We're here looking at the sys and wherefores, whether it's junk science or not; the whys and wherefores, the factual basis, the reasons given for the opinion and I find that they're deficient.

Never asked to measure or wear - - the amount of sound that would come from the earpiece, especially as opposed to

all the other noises in the casino. Did not know if the pitch was higher or lower from all the environmental sounds - - from all the other one-armed bandits that are around - - that they work around on an eight hour basis. Could not - - Nagler could not determine whether it was a severe intrusive - - as she indicated. But I'm not going to use that as a grounds. He diagnosed this condition solely on what the plaintiffs told him. There were no other independent determiners that impacted on the issue of handicap.

But that's another reason. Some plaintiffs are exaggerators; some patients are minimizers. There was no reliability test that could be drawn.

The real issue is that there was the lack of these underlying tests vis-à-vis the earpiece and the other noises that could be - - that she's around on a constant basis that could have been greater, more harsh, more horrible that an earpiece that was stuck in her ear. We don't know that there was any difference. We don't know what the controls were like, how loud the noises were with respect to the earpiece

that could have been stuck in her ear. She never used the earpiece. She has no testimony to the doctor with respect to the particular device that was sought to be used. Didn't try the earpiece on himself; didn't report on it.

So with respect to both of these - - and he never examined her, as well - - I find that there is a lack of - - a bisis for a report that is a net opinion and insufficient, assuming, arguendo, that the Court should find that tinnitus was a handicap. The whys and wherefores really were not appropriately established by a sound factual basis.

Further, the only, apparently, testimony he had with respect to Spahr was that it would interfere with his concentration abilities. And Spahr, himself, said in depositions that it didn't interfere with his concentration or words to that effect, as is pointed out by the defendant. And I don't know how, I mean, that would tie in. I mean that's kind of a naked assertion by the doctor with no factual basis. As a matter of fact, the plaintiff, himself, had - - contradicts that factual basis - - contradicts that conclusion.

The third issue was - - and on the cross motion - - strike that. The third issue was that there was a legitimate grounds to terminate Bendon, separate and apart, as a matter of law. And I can't agree with that. I would deny any motion for summary judgment based on that ground and the order should find that - - should so indicate.

It could be akin to a constructive termination issue, as I view it, that if she said that it was so bad and that she couldn't work because if she had - - was forced to wear it and she couldn't wear it - - she didn't wear it - - that it would be so bad and they said, "Well, that's too bad," and she didn't go to work, whether she lied or tried to make another excuse, I don't know that I can say as a matter - - I can't say as a matter of law that's a legitimate - - that her absenteeism is a legitimate grounds to terminate her.

I'm not going to say that as a matter of law. That may be - - they may all be issues for a Jury if the case goes to the Jury to determine if there was an otherwise legitimate

reason. So the motion for summary judgment on that grounds is denied.

Grounds to dismiss. No proofs that the earpiece aggravates or worsens her tinnitus. That, I guess, is tied in with the prior determinations that I made under lack of medical proof. There is no proof that the earpiece, in this case, under these work conditions, is any different that any of the other noises and that it aggravates or worsens her tinnitus. I would put that under the medical proofs issue.

The issue whether the accommodations were adequate or inadequate, the accommodations being offering her a leave to get a job with Resorts - - or I guess during that leave she could have gone to any other casino. And you can only get a job that you're qualified for and if there's no jobs there's no jobs. But they're all issues for a Jury, as far as the nature and extent of the accommodations.

Wearing a different earpiece, I have no idea what that other earpiece - - how that would differ from – and the

record doesn't so indicate - - from the earpiece that initially she was issued.

So those are issues on the cross-claim that I should find, as a matter of law, that they were inadequate. I can't find either way. That would be something that would have to be a Jury issue.

So with respect to the cross-claim, as a matter of law that the accommodations were inadequate, I would deny that for summary - - partial summary judgment on that issue. I would deny that only on the grounds it's an issue of fact. And I think Mr. McFadden was right when he mentioned that initially. Even accepting these facts, I think it's an issue of - - I don't think it's a matter of law for me.

Is there anything I haven't ruled on? Any issue I haven't ruled on? So the Appellate Division, if it goes up - -

Mr. SCHRIER: I don't think so.

THE COURT: - - that they have a full package. Okay. If not, gentlemen, I enjoyed the arguments. Mr. McFadden I enjoyed your brief, as well. Enjoyed your arguments. Very

interesting issue. These are the kind of issues that make a lawyer feel like a lawyer and a judge feel like a judge.

MR. SCHRIER: That's true.

THE COURT: We'll have to see what they do on appeal.

MR. McFADDEN: Thanks, Judge.

SUPREME COURT OF NEW JERSEY
C-30 September Term 2002
53-073

WINONA BENDON
Plaintiff – Petitioner
v.
RESORTS INTERNATIONAL HOTEL, INC.,
Defendant – Respondent.

ON PETITION FOR CERTIFICATION

THOMAS R. SPAHR,
Defendant – Petitioner,
v.
RESORTS INTERNATIONAL HOTEL, INC.,
Defendant-Respondent.

Filed:
Sep. 6, 2002

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4187/4188-00 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 5th day of September, 2002.

Stephen Townsend, Clerk of the Supreme Court

APPENDIX C

EXTRAORDINARY CIRCUMSTANCES

The Plaintiffs Thomas R. Spahr and Winona Bendon did not submit a Petition for rehearing with the New Jersey Supreme Court after their denial of certification on Sept. 6 2002. We had received a letter from our attorney Louis P. McFadden stating "there are no realistic alternatives at this point". We were unaware that we could file a petition for rehearing until after the deadline, and were never advised of this matter by our attorney.

We request that the U.S. Supreme Court in spite of this deficiency consider our pro se Petition for Writ of Certiorari.

APPENDIX D

The Law Offices Of
Louis P. McFadden, Jr.
A Professional Corporation
2106 New Road
Linwood Commons, Suite F-4
Linwood, NJ 08221

(609) 601-2330

September 12, 2002

Winona Bendon
52619 882 Road
Verdigree, NE 68783

Tom Spahr
109 Ladis Way
Mystic Island, NJ 08087

Re: Bendon v. Resorts **and** Spahr v. Resorts

Dear Ms. Bendon and Mr. Spahr:

Enclosed please find a copy of the notice I received from the Supreme Court denying our petition for certification.

As far as I can see, there are no realistic alternatives at this point.

If you have any questions, please don't hesitate to contact me.

Sincerely,

Louis P. McFadden, Jr.

TABLE OF AUTHORITIES

Cases Cited:

Enriquez v. West Jersey Health Systems, et als

Tynan v. Visinage Thirteen of Superior Court of N.J.

Olson V. General Electric Astrospace, et al

Gimello v. Agency Rent-A-Car Systems, Inc. et al

Clowes v. Terminex Inter., Inc.

Anderson v. Exxon

Gaul v. Lucent Technologies, Inc.

Shelton v. University of Medicine and Dentistry of N.J.

Heitzman v. Monmouth County, et als

Baldyga v. Oldman

Barhle v. Exxon Corp

Bellardini v. Krikorian

Buckelew v. Grossbard

Casino Revestment Develop. Auth. v. Lustgarten

Castroll v. Franklin Twp.

Cavanaugh v. Skil Corp.

APPENDIX E

Correa v. Maggiore

DaGraca v. Laing

Dawson v. Bunker Hill Plaza Association

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EXCERPT FROM THOMAS SPAHR'S DEPOSITION

Pg. 50

BY RESORTS ATTORNEY MS. HALBER

Q. What is it about the earpiece then exactly that exasperates the tinnitus?

A. When you place something in you ear, in your ear that admits noise that according to one of the doctors who I spoke with Dr. Berman, causes the ear, the air in the ear to vibrate and causes what he said was muscle spasms in the ear, to be very specific, and I'm quoting what he told me. Those muscle spasms exasperates the tinnitus and causes the ear to ring. Now, when you place something away from your ear here there is a distance that sound must travel before it comes into your ear, so it's not as powerful and not as loud. When you place it directly into your ear, it is a confined area. That area is confined. So it is the vibrations of the noise itself in the ear that causes the tinnitus to get much worse.

APPENDIX F

DR. NAGLER'S REPORT, DATED AUG. 14, 2000

Alliance Tinnitus and Hearing Center

Stephen M. Nagler
M.D., FASC
Director

August 14, 2000

Mr. Louis P. McFadden, Jr.
2106 New Road
Linwood Commons, Suite C-4
Linwood, NJ 08221

Dear Mr. McFadden:

Thank you for your letter of July 11, 2000. I have reviewed in detail the arbitration memoranda filed on behalf of Resorts Casino Hotel in the cases involving Winona Bendon (Docket No. ATL-L-1578-99) and Thomas R. Spahr (Docket No. ATL-L-1579-99) as well as the supporting documentation enclosed with your letter. I have not as of this time had an opportunity to meet, to interview, or to personally evaluate either Ms. Bendon or Mr. Spahr.

My opinion differs markedly from that offered by Dr.

Satoloff in his letter of April 3, 2000 regarding Winona Bendon and in his letter of April 3, 2000 regarding Thomas R. Spahr.

While it is true that tinnitus is rather common condition (occurring in approximately 20%of the population), tinnitus severe enough to cause distress and to significantly interfere with the ability to work is not at all common, occurring in less than 1% of the population. Ms. Bendon and Mr. Spahr in their depositions describe tinnitus that is constant, intense, interferes with the ability to communicate, affects ability to sleep, causes headaches and causes distress. Their ears ring loudly *all the time.* Ms. Bendon and Mr. Spahr *know no silence.* Clearly the intrusive tinnitus that they very accurately describe is far different from the common "run of the mill" tinnitus discussed in Dr. Satoloff's letter. Moreover, patients with this type of severe intrusive tinnitus find that noise exposure almost uniformly aggravates tinnitus. The level of noise exposure that would result in such an increase in tinnitus does not need to approximate the

levels described by OSHA as causing *auditory damage*. The type of noise levels that would be required in order to hear verbal messages through an ear piece while a person is in a crowded room would certainly be of a degree loud enough to exacerbate tinnitus. While Dr. Satoloff correctly points that wearable masking devices are commonly used in tinnitus patients, such devices produce low level broad spectrum "white noise" – quite different from the type of irregular loud staccato bursts from an instrument such as that described in the depositions.

Dr. Satoloff states in his letter that tinnitus is considered a normal concomitant to hearing difficulties. This statement is simply inaccurate. Indeed, the vast majority of people with hearing loss do not have tinnitus at all! While noise-induced auditory damage can result in both hearing loss and in tinnitus, the hearing loss per se does not cause the tinnitus. In my opinion, it is totally reasonable and advisable for Ms. Bendon and Mr. Spahr to take any steps available to them to avoid the kind of additional excessive noise exposure that

would be encountered with the ear pieces described. In terms of whether tinnitus satisfies the definition of "handicap" under New Jersey law, he answer is self-evident. Intrusive tinnitus as described by the two plaintiffs is an abnormal *physiological* condition that can prevent the normal exercise of mental function due to distress and distraction caused by the experience of incessant sound from which there is no escape. If the total inability of an individual to find modicum of "peace and quiet" twenty-four hours a day seven day a week is not a handicap due to a physiological condition (i.e., an abnormality of central auditory processing), I do not know what is.

A question arises n terms of whether or not the decibel levels around the slot machines are within OSHA standards. In this regard, I would like to point out that OSHA standards are designed to protect only 90% of the population; unfortunately, one cannot predict which 10% of the population the OSHA standards do not protect. Moreover, specifically in terms of the two plaintiffs, I wish to again

point out that noise levels below OSHA standards can easily exacerbate intrusive tinnitus without causing auditory damage.

Patients with severe intrusive tinnitus such as that described by Ms. Bendon and Mr. Spahr are well advised to avoid the type of earphones described in the depositions, as this instrumentation will undoubtedly complicate an already extremely burdensome medical condition.

Sincerely,

Stephen M. Nagler, MD, FACS

Supreme Court, U.S.
FILED
APR 25 2003
OFFICE OF THE CLERK

No. 02-1431

IN THE

Supreme Court of the United States

THOMAS R. SPAHR and WINONA BENDON,

Petitioners,

v.

RESORTS INTERNATIONAL HOTEL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May petitioners seek review of a state court decision in which no federal question was raised or decided in violation of 28 U.S.C. § 1257?

2. May petitioners seek review of a state court decision that was decided on independent and adequate state grounds?

3. Are the equal protection and due process clauses of the Fourteenth Amendment implicated by state law handicap discrimination claims against a private corporation?

CORPORATE DISCLOSURE STATUS

Respondent Resorts International Hotel, Inc. d/b/a Resorts Atlantic City ("Resorts") is a wholly owned subsidiary of Resorts International Hotel and Casino, Inc.

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Respondent, Resorts International Hotels, Inc., submits this brief in opposition to the Petition for Certiorari, which seeks a review of the decision of the Superior Court of New Jersey, Appellate Division.

OPINIONS BELOW

The New Jersey Supreme Court denied certification at 807 A.2d 194 (2002) by an Order contained in Appendix C of the Petition for Certiorari. In doing so, that court denied review of a judgment announced in an unreported opinion of the Superior Court of New Jersey, Appellate Division, Docket nos. A-4187-00T2 and A-4188-00T2, located at Appendix A to the Petition for Certiorari.

STATEMENT OF JURISDICTION

Petitioners, Winona Bendon and Thomas Spahr, claim jurisdiction under 28 U.S.C. § 1257. Their claim is unfounded. The federal questions raised by petitioners were neither argued nor decided below and therefore were not preserved for this Court's review. To the extent petitioners are seeking interpretation of the New Jersey Law Against Discrimination, ("LAD") N.J.S.A. 10:5-1, *et seq*., the petitioners do not raise any federal question. As a result, this Court is without jurisdiction to hear this matter.

COUNTERSTATEMENT OF THE CASE

Petitioners' recitation of the issues presented contains numerous factual and legal misstatements. Those misstatements include scurrilous and wholly unsubstantiated statements concerning the New Jersey judiciary and the casino industry. Because the record below demonstrates that the questions

presented are without merit and were never raised or adjudicated below as required under 28 U.S.C. § 1257 and relevant case law, as well as under Supreme Court Rule 14(1)(g)(i), the Court should deny the Petition for Certification.

First, no issue relating to equal protection or due process was argued or decided below. Second, the state courts below decided this action on independent state grounds. The sole issue below was whether petitioners had made a prima facie case of handicap discrimination under the LAD. The courts below found that petitioners had failed to present competent evidence that the earpieces they were required to wear at work caused or exacerbated a condition known as tinnitus. Third, there is no evidence of any State action triggering the protections of the equal protection and due process clauses insofar as they relate to the claims against Resorts.

STATEMENT OF MATERIAL FACTS

A. Background

Resorts hired Winona Bendon as a slot attendant on August 14, 1995. (Pet Bendon's App. Div. Apx. at PBa1.) Slot attendants work on the casino floor and are primarily responsible for tending to the slot machines (*i.e.*, filling empty machines, fixing minor machine malfunctions) and assisting customers (*i.e.*, paying off jackpots and answering questions). (*Id.* at PBa17).

Thomas R. Spahr was first hired by Resorts as a pit clerk on April 29, 1993, but was terminated on July 29, 1993 for failing to meet his job requirements. Resorts hired Spahr as a slot attendant on August 9, 1993. (Pet. Spahr's App. Div. Apx. at PSa166.)

All Resorts casino personnel, including slot attendants, must use radios to communicate with one another and their operation's base. (Pet. Bendon's App. Div. Apx. at PBa18.) Casino employees use short-wave, hand-held ("walkie-talkie") radio units that have channel and volume adjustment controls. Radio communication among Resorts personnel is nearly constant.

On November 5, 1997, Resorts implemented the use of an earpiece attachment to the radios used by Resorts personnel. (*Id.* at PBa28.) The earpiece has a one-inch in diameter foam piece, which goes against the ear and a rubber or plastic piece which goes behind the ear. (*Id.* at PBa20.)

Resorts' decision to require slot attendant employees to use an earpiece was prompted by both security and customer service concerns. When the radio is worn without an earpiece, the casino customers can hear all conversations between casino employees. (*Id.* at PBa19.)

B. Facts Relating to Bendon

On or about October 8, 1997, one month before Resorts issued an earpiece to Bendon or anyone else in the slot department, Bendon wrote a memorandum to the Resorts' slot department management outlining her concern that the use of the radio, particularly with an earpiece, posed a danger to her health due to hazardous over-exposure to electro-magnetic waves. (*Id.* at PBa29.)

When Resorts formally issued earpieces to the slot department on November 5, 1997, Bendon refused to wear the earpiece and for the first time claimed, without trying on the earpiece, that she had tinnitus and that use of the earpiece would exacerbate her discomfort and cause hearing loss. (*Id.* at PBa22-23.)

Joanne Kraly, the slot department manager called Bendon to her office on November 7, 1997, gave Bendon a written warning of unsatisfactory performance and told Bendon that she must wear an earpiece with her radio or she would be written up again. (*Id.* at PBa33.)

Bendon called out sick on November 8th and 9th, 1997 and reported that she had a stomachache. (*Id.* at PBa34.) She was off from her job on November 10th and 11th, 1997. (*Id.*)

Bendon went to see her family doctor, Dr. Gary W. Raab, D.O., on November 11, 1997. Dr. Raab wrote a letter dated November 11, 1997, which was unsigned and said that Bendon should not wear the earpiece. (*Id.* at PBa36.)

Bendon returned to work from November 12 through November 16, 1997. (*Id.* at PBa34.) On November 12, 1997 Ms. Kraly met with Bendon and advised her of the departmental guidelines which required two hours notice of all sick calls. (*Id.* at PBa37.)

Resorts asked Bendon to submit to an evaluation with J. Patrick Clancy, Jr., M.D. Bendon was evaluated by Dr. Clancy on November 18, 1997. (*Id.* at PBa38.) Clancy advised Resorts that there was no medical reason for Bendon to be excused from wearing the earpiece. (*Id.*)

Bendon was absent from work on November 19, 1997-November 23, 1997. Her employment attendance records document that she was absent based on the "earpiece conflict." (*Id.* at PBa34.) Bendon continued to refuse to wear the earpiece. Bendon never tried to work at any time with the earpiece. (*Id.* at PBa21.)

Bendon met with Resorts personnel, Phil Mazzone and Joanne Kraly on November 25, 1997. (*Id.* at PBa39.) At the meeting Resorts told Bendon that her attendance records reflected six call-outs. Resorts told Bendon that they did not wish to terminate her, but that it was a condition of her employment that she wear an earpiece. (*Id.* at PBa39.) Resorts further advised Bendon that if she continued to call out of work, Resorts would have no alternative but to terminate her employment. (*Id.*)

At the November 25, 1997 meeting, Bendon was offered the opportunity to take a personal leave, which would toll the time of her absences. She could then speak to an employment representative to determine if there was a suitable position available at Resorts that did not require her to wear an earpiece. (*Id.* at PBa39; PBa27.) Resorts discussed a position which was available in the slot bank department with Bendon, however, she was not interested in the position. (*Id.*)

Bendon was discharged for excessive absenteeism on December 5, 1997. (*Id.* at PBa41, 42.) Resorts received a report from Bendon's physician, Dr. Matlick, an otolaryngologist, on December 8, 1997. (*Id.* at PBa43.)

C. Facts Relating to Spahr

Spahr acknowledged receipt of his earpiece on November 5, 1997. Spahr wore the earpiece for his shift on November 5, 1997 without incident. (Pet. Spahr's App. Div. Apx. at PSa81.)

On or about November 6, 1997, Spahr objected to wearing the earpiece, stating that he had tinnitus and that the

earpiece aggravated his condition. (*Id.* at PSa61.) At Resorts' request, J. Patrick Clancy, Jr., M.D., evaluated Spahr on December 9, 1997. Dr. Clancy determined that there was no medical reason for Spahr to be excused from wearing the earpiece. (*Id.* at PSa38.)

Mr. Spahr submitted a prescription form to Resorts from Dr. Ansel, M.D., which was dated December 9, 1997 and said that Mr. Spahr, "should not be required to wear headphones at work." (*Id.* at PSa135.)

Resorts advised Mr. Spahr that he would need to wear the earpiece if he wished to remain employed as a slot attendant. Although Resorts did not find that Mr. Spahr had a "handicap" under the LAD, Resorts gave Mr. Spahr the opportunity to take a leave of absence for thirty days to locate another position at Resorts and offered to let Mr. Spahr wear a different earpiece. PSa65. Mr. Spahr rejected these offers.

Since November 9, 1997, Mr. Spahr has worn the earpiece, although he claims that wearing the earpiece increases his bouts of tinnitus, gives him headaches and generally makes him uncomfortable at his job. (*Id.* at PSa70-71.)

D. Dr. Nagler's Opinions

Plaintiffs retained Stephen N. Nagler, M.D., FACS, as an expert in their cases. Dr. Nagler is not an otolaryngologist (an ear, nose and throat specialist), or an otologist (an ear treatment specialist), but is a surgeon by training, who specialized in general surgery, colorectal surgery and breast surgery. (*Id.* at PSa51.) Dr. Nagler switched careers three years ago, and is now the director of the Alliance Tinnitus Center in Atlanta, Georgia. (*Id.* at PSa50.)

Dr. Nagler concluded in his August 14, 2000 report that plaintiffs suffered "severe intrusive tinnitus" and that they should not wear the earpieces. (*Id.* at PSa60.) Dr. Nagler's conclusion that plaintiffs have severe tinnitus lacks factual support since Dr. Nagler never examined plaintiffs, (*id.* at PSa50), never visited the Resorts Casino, *Id.*, never examined the earpieces plaintiffs were asked to wear or measured the amount of sound that would come from the earpiece. (*Id.* at PSa53). Dr. Nagler further did not know if the pitch of the sound that comes from the earpiece is higher or lower than the environmental sound around it. (*Id.* at PSa54.)

Dr. Nagler further could not determine that plaintiffs' tinnitus was severe or intrusive since tinnitus itself cannot be objectively measured. (*Id.* at PSa50.) Dr. Nagler admitted that he diagnoses patients solely based on what the patient tells him. (*Id.* at PSa55.) Dr. Nagler further admitted that there is no test to determine the severity of tinnitus and that "some patients are exaggerators, some patients are minimizers." (*Id.* at PSa54.) Dr. Nagler testified that reliability tests can be performed to determine within a high degree of probability whether or not a person actually has tinnitus. (*Id.* at PSa57.) Dr. Nagler admitted that he did not perform a reliability test on plaintiffs, therefore, by his own admission, Dr. Nagler cannot conclusively determine that plaintiffs have tinnitus and cannot accurately quantify the level of their tinnitus.

Dr. Nagler testified that tinnitus itself does not cause hearing loss and that hearing loss does not cause tinnitus. (*Id.* at PSa56.) Dr. Nagler denied than any person with tinnitus is "handicapped" as defined by the LAD. (*Id.* at PSa58.)

Dr. Nagler admitted at deposition, that since Bendon never actually tried to wear the earpiece, he could not render an opinion as to whether or not Bendon should be excused from wearing an earpiece at Resorts. At deposition, Dr. Nagler was asked by counsel for Resorts:

> Q. Is it your opinion that Ms. Bendon should not wear the earpiece in this case?
>
> A. Yes.
>
> Q. What is your opinion based on?
>
> A. My opinion is based — Okay. My opinion is that if the — Let me change that. Thank you. My opinion is that if she tries to use the earpiece and if it aggravates her tinnitus, that she shouldn't use the earpiece. My opinion is if she tries to use the earpiece and the noise level from the earpiece violates OSHA regulations, she shouldn't wear the earpiece. But without having tried the earpiece herself and reporting it, I don't have an opinion.
>
> Q. Is that because every individual is different? You'd have to speak to them about the impact of trying something versus not trying it?
>
> A. Yes.

(Pet. Bendon's App. Div. Apx. at PBa59.)

As part of discovery in this case, defendant's expert, Dr. Joseph Sataloff, M.D. measured the noise levels in the casino and found them to be well within OSHA regulations.

(*Id.* at PBa46.) Dr. Sataloff further observed that Bendon never actually tried to work with the earpiece and that typically tinnitus is treated by the use of an earpiece device, which acts as a noise masker. (*Id.*)

Dr. Nagler also concludes that Spahr's tinnitus created a "concentration impediment" which affected his "concentration" and thus, his ability to perform his job. (Pet. Spahr's App. Div. Apx. at PSa57.) Dr. Nagler alleges that he reviewed Spahr's deposition testimony to determine that Spahr has a "concentration impediment." (*Id.*)

Nowhere in Spahr's deposition does Spahr describe that his tinnitus condition makes it difficult for him to concentrate at work. (*Id.*) Thus, Dr. Nagler lacks any basis to conclude that Spahr suffers a "concentration impediment" from his tinnitus condition. Dr. Nagler also admitted that he could not diagnose the underlying cause of Mr. Spahr's tinnitus. (*Id.* at PSa57.)

REASONS FOR DENYING THE WRIT

I.

THE FEDERAL QUESTIONS WERE NOT ARGUED OR DECIDED BELOW

For this Court to review the final judgment of a state court, some question of federal law must have been presented below. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). Indeed, where the opinion below does not "'pass upon'" some

federal question, this Court will "'assume[] that the omission was due to want of proper presentation in the state courts.'" *Id.* at 495 (quoting *Street v. New York*, 374 U.S. 576, 582 (1968)). The Court thus "decline[s] to reach" claims "not raised and passed upon in state court." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *accord TXO Prod. Co. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (refusing to consider constitutional attack on jury instructions not raised in highest state court below); *Rigging v. Nevada*, 504 U.S. 127, 133 (1992) (declining to reach Eighth Amendment claim not raised before Nevada Supreme Court); *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992) (declining to reach substantive due process claim not raised below due to lack of jurisdiction under 28 U.S.C. § 1257); *Perry v. Thomas*, 482 U.S. 483, 492 and n.9 (1987) (refusing to decide standing and unenforceability issues not raised below); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("[T]he Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."). Indeed, "[t]he Court has consistently refused to decide federal constitutional issues raised here for the first in review of state court decision." *Cardinale*, 394 U.S. at 438.

Preservation of the federal question in the state proceeding from which review is sought is a necessary element of this Court's jurisdiction under 28 U.S.C. § 1257. *Yee*, 503 U.S. at 533 (discussing preservation of federal claim in state proceedings as requirement of "jurisdictional grant of 28 U.S.C. § 1257"); *Webb*, 451 U.S. at 495 (requiring, as matter of jurisdiction, petitioner to raise Constitutional claim in state court); *New York Times Co. v. Jascalevich*, 493 U.S. 1331, 1332 (1978) (discussing 28 U.S.C. § 1257 as jurisdictional basis for review). Determining whether an issue was properly preserved is a federal question for this Court to decide. *Street*, 394 U.S. at 593. A state court decision cannot be said to have passed on

federal questions that were never raised before it. *Bankers Life*, 486 U.S. at 79 n.2 ("'A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it.'" (quoting *Dewey v. Des Moines*, 173 U.S. 193, 200 (1899))). Therefore, the Supreme Court Rules require a petitioner seeking review of a state court judgment to specify, with specific citations to the record below, when federal questions were raised below and how the state court below passed on them. Sup. Ct. R.14.1(g)(i); *accord Webb*, 451 U.S. at 495 (discussing former R.21.1(h)).

Underlying the requirement that federal questions be first raised in state court proceedings are "powerful policy considerations." *Webb*, 451 U.S. at 499. Those considerations include "comity to the States" and "a constellation of practical considerations." *Bankers Life*, 486 U.S. at 79. Comity to the states stems from the need to allow state courts an opportunity to defend state law from federal challenges in order to preserve states' independent functioning and to allow them to construe state law so as to avoid challenges under federal grounds. *Webb*, 451 U.S. at 499-500. The "practical considerations" involve the proper development of the record below, which is necessary for correct adjudication of the federal questions raised before this Court. *Bankers Life*, 486 U.S. at 79; *Webb*, 451 U.S. at 500; *Cardinale*, 394 U.S. at 439 ("Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not complied with those questions in mind."). Also, litigation of the federal issues in state courts permits adjudication under state law, which "may well obviate any reason for [this court] giving plenary consideration to the case." *Webb*, 451 U.S. at 501; *accord Cardinale*, 394 U.S. at 439; *see also North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*,

414 U.S. 156, 159 (1973) (stating that "finality requirement" of 28 U.S.C. § 1257 prevents "piecemeal review" of state court decision; avoids advisory opinions; and minimizes "federal intrusion into state affairs" by limiting review of state-court decisions).

As is clear, the requirement under 28 U.S.C. § 1257 that a federal question be raised and addressed by the state court below is no mere "'technicalit[y] to be easily scorned.'" *Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178, 180 (1952) (quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945)). The minimum requirement for jurisdiction under 28 U.S.C. § 1257 is that the record must make clear that a claim under a federal statute of the Federal Constitution "'was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.'" *Bankers Life*, 486 U.S. at 77-78 (quoting *Webb*, 451 U.S. at 501). Moreover, the federal claim must have presented to the state courts with sufficient specificity. A "vague appeal to constitutional principles does not preserve [an] appellant's [constitutional] or due process claims. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Id.* at 77.

Thus, for this Court to reach the merits of a federal question arising out of state court proceedings, the record must "clearly show[] that the federal issue has been properly raised below." *Id.* at 499. Specifically, the claim must "'be brought to the attention of the state court with fair precision and in due time,'" which is accomplished "if the record as a whole shows whether expressly or by clear intendment" the federal question was properly raised. *Street*, 394 U.S. at 584 (quoting *New York*

ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928)). The Bankers Life Court referred to that requirement as "the 'not pressed or passed upon below' rule." 486 U.S. at 79.

As a result of that failure to raise federal questions in the state court proceedings, petitioners have failed to give the New Jersey court system an opportunity to defend its state laws against the challenge on federal issues that they now raise before this Court. *See Webb*, 451 U.S. at 499-500. Moreover, the record below is devoid of evidence, argument, and state-court reasoning on the subject, so that correct adjudication by this Court is impossible. *See Bankers Life*, 486 U.S. at 79. This record does not even present a general reference to the Federal Constitution such as that present in *Bankers Life*, 486 U.S. at 77 (declining to find federal question jurisdiction based on allegation below that punitive damages award "violates constitutional principles"). The record below cannot be said to show, "'whether expressly or by clear intendment,'" that any federal question was properly raised in the state-court proceedings. *Street*, 394 U.S. at 584 (quoting *Bryant*, 278 U.S. at 67). As a result of petitioners' failure to preserve any federal claim in the state proceedings below, this Court is without jurisdiction to grant certiorari, and it must deny this Petition on that ground alone.

II.

THE DECISION BELOW WAS DECIDED ON INDEPENDENT STATE GROUNDS, DEPRIVING THIS COURT OF JURISDICTION

As this Court has stated, "[w]hen a state-court decision is clearly based on state law that is both adequate and independent, we will not review the decision." *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990). The presence of adequate and independent state grounds for a state-court decision presents a jurisdictional bar to this Court's review that must be considered before the Court can reach the merits of a case. *Id.* The Court can review a state-court decision only if that decision rests primarily on federal law or if state and federal law are "'interwoven'" such that "'the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985), *cert. denied*, 479 U.S. 1075 (1987).

As the opinion of the New Jersey Superior Court, Appellate Division, makes clear, the decision below rests entirely on the application of state law. (Appendix A to Petition for Certification) The court below makes no reference to any federal question. Petitioners never raised such issues in the state-court proceedings below. Under *Rodriguez* and *Caldwell*, this Court is without jurisdiction to review the state court opinion below. As a result, it must deny this Petition for Certiorari.

III.

BECAUSE RESORTS IS A PRIVATE ENTITY, THE EQUAL PROTECTION AND OUR PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT CANNOT FORM THE BASIS OF A CLAIM AGAINST RESORTS

It is a "time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action." *United States v. Morrison*, 529 U.S. 598, 621 (2000) "The principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Id.* "That amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Id.* (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 and n.12 (1948)).

In *American Mfrs. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999), this Court stated:

> [W]e have consistently held that 'the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.' Faithful application of the state action requirement in these cases ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts.

(Citations omitted). *Accord Blum v. Yaretsky*, 451 U.S. 991, 1002-03 (1982).

Resorts is a private entity. Its actions cannot be regarded as those of the State. Accordingly, petitioners' constitutional claims cannot succeed.

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for Certiorari.

Respectfully submitted,

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